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In The

Supreme Court of the United States

DON CURTIS TERRILL,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fourth Circuit decide an important federal question in conflict with the decision of another United States court of appeals on the same important matter or decide an important question of federal law that has not been, but should be, decided by the Court when it held that Confederate-American is not a valid national origin for equal protection purposes?

2. Did the Fourth Circuit decide an important federal question in conflict with the decision of another United States court of appeals on the same important matter or decide an important question of federal law that has not been, but should be, decided by the Court when it held that denying a Confederate-American the right to participate in an employer-sponsored festival on the grounds of his national origin did not constitute an adverse employment action?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case. None of the parties has a parent company or non-wholly owned subsidiary.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Terrill v. Chao*, 31 Fed. Appx. 99 (4th Cir. 2002) *cert. filed*, decided on March 11, 2002, is set forth in the Appendix at A-1. The district court's unreported order in Case No. 00-1488-A, dismissing Terrill's claims for failure to state a claim for which relief may be granted, was filed on May 1, 2001, and is set forth in the Appendix at A-4. The Equal Employment Opportunity Commission's Decision in Appeal No. 019992831, refusing to find Confederate American is a national origin, was filed on May 31, 2000, and is set forth in the Appendix at A-1.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was decided on March 11, 2002. There has been no order respecting rehearing, and no order granting an extension of time to file a petition for writ of certiorari. There has been no cross-petition for writ of certiorari filed. Jurisdiction to review the decision in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1). This case does not require notification under Sup. Ct. R. 29.4(b) or (c).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

42 U.S.C. § 2000e-16(a) provides:

> Discriminatory practices prohibited; employees or applicants for employment subject to coverage
>
> > All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits

of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 if Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

29 C.F.R. § 1606.1 provides:

> Definition of national origin discrimination
>
> The commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin

group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples, or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply generally Title VII principles, such as disparate treatment and adverse impact.

STATEMENT OF THE CASE

Statement of the Facts

Don Curtis Terrill, Petitioner herein (hereinafter referred to as "Terrill") is an employee of the Mine Health and Safety Administration, a division of the United States Department of Labor (hereinafter referred to as "DOL") working in Arlington, Virginia. On July 23, 1998, Terrill received an email regarding an event that would be held at work to "highlight diversity." Employees were invited to attend this event (hereinafter referred to as "Diversity Day") and were invited to "set up a cultural display, showcase a talent, bake an international dessert, or recommend an international game." Interested DOL employees were instructed to contact the event coordinator.

Terrill contacted the coordinator and expressed an interest in setting up a booth with a cultural display regarding Confederate Americans, a group in which he claimed membership. In response, the event coordinator indicated that the DOL was only interested in "highlighting our ethnic and cultural diversity," that it did not wish to include "historic events or groups," and declined to allow Terrill to participate in Diversity Day.

In response to this refusal, Terrill replied that Confederate Americans were not a historical event, but were an identifiable group with a common cultural heritage, and again requesting that he be allowed to participate in Diversity Day. Terrill was again denied the opportunity to participate in Diversity Day, a decision that was confirmed by the event coordinator's supervisor.

Diversity Day celebrations were held in September, 1998. National origins that the DOL allowed to participate included Romanian, Japanese, Kenyan, "Hispanic nations," Australian and "Nations of the World." Other, non-national groups were also allowed to participate, such as the "Bisexual, Gay & Lesbian Young Outreach Program." Terrill was not allowed to participate in Diversity Day as a Confederate American.

Proceedings Below

Terrill began by filing an administrative complaint with the Civil Rights Center of the DOL, based on the decision to deny him the right to participate in Diversity Day. This complaint was dismissed for the failure to state a claim, on the grounds that Confederate-American was not a national origin. Appendix at A-8.

Terrill appealed the dismissal of his administrative claim to the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC"). The EEOC upheld the dismissal of Terrill's complaint, finding that "'Confederate-American' is not a national origin as defined in [29 C.F.R.] § 1606.1." Appendix at A-1. From this disposition, Terrill timely filed suit in the District Court.

In response to Terrill's suit, the DOL moved to dismiss his claims for failure to state a claim for which relief may be granted or, in the alternative, for summary judgment. The District Court held that Confederate-American was not a protected class under Title VII and that

Terrill had suffered no adverse employment action, and therefore dismissed Terrill's suit. Appendix at A-4.

Terrill appealed this dismissal to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the District Court's decision, holding that Terrill "fails to establish that he is either a member of a protected class or that he suffered an adverse employment action." Appendix at A-5. From this disposition, the instant Petition for Writ of Certiorari has been filed.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction over the suit filed by Terrill pursuant to 28 U.S.C. § 1331, because the suit presents a federal question arising under 42 U.S.C. §2000e, et seq.

ARGUMENT

I. IN CONCLUDING THAT CONFEDERATE AMERICAN IS NOT A VALID NATIONAL ORIGIN AS A MATTER OF LAW, THE FOURTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER THAT CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS, AND DECIDED AN ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE COURT.

The first issue is whether the Court of Appeals for the Fourth Circuit correctly determined that Confederate American is not a national origin that can support an employment discrimination claim. Although no Court of Appeals has directly addressed the issue of whether Confederate American is a "valid" national origin, the decision of the Fourth Circuit conflicts with other decisions recognizing that non-national groups like Confederate

Americans may raise national origin claims. The Fourth Circuit's opinion is also at odds with decisions of this Court that hold that the concept of national origin is a broad one, and the Court should take the opportunity to decide this important issue itself.

"National Origin" Generally

The term "national origin" is not a defined term in the Civil Rights Act of 1964. Although the legislative history of the Act of 1964 is voluminous, none of it specifically addresses why Congress chose to use the term "national origin" to describe one kind of discrimination that was being prohibited, nor what Congress believed was encompassed within the ambit of the phrase "national origin." What is known is that the initial draft of the Civil Rights Act of 1964 prohibited discrimination against individuals on grounds of their "ancestry," Minority Report on the Proposal for the Civil Rights Act of 1963, Committee on the Judiciary Substitute for H.R. 7152, 1964 U.S.S.C.A.N. 2455, but that the term "ancestry" was omitted from the Act as passed, indicating that Congress believed the phrase "national origin" adequately encompassed the concept of "ancestry."

The Court has addressed the meaning of "national origin" only once, in *Espinoza v. Farah Manuf. Co., Inc.*, 414 U.S. 86 (1973). The issue presented in *Espinoza* was whether the phrase "national origin" embraced the term "citizenship." Although not directly pertinent to the issue presented in this case, *Espinoza* discussed the meaning of the phrase "national origin," concluding it was synonymous with "ancestry":

> The statute's legislative history, although quite meager in this respect, fully supports this construction. The only direct definition given to the phrase 'national origin' is the

> following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: 'It means the country from which you or your forebears came ... You may come from Poland, Czechoslovakia, England, France or any other country.' We also note that an earlier version of § 703 had referred to discrimination because of 'race, color, religion, national origin, or *ancestry*," suggesting that the terms 'national origin' and 'ancestry' were considered synonymous."

Espinoza, 414 U.S. at 88-89 (emphasis in the original; internal citations omitted).

Both the limited legislative history and *Espinoza* show that "national origin" includes "ancestry," and therefore a prohibition against discrimination on the basis of national origin prohibits discrimination based on ancestry, i.e., where the victim's family originally came from. 29 C.F.R. § 1606.1 (defining national origin discrimination as discrimination based on "an individual's ... place of origin"). Accordingly, a victim who has been discriminated against because of where his or her ancestors came from has suffered from prohibited national origin discrimination. Because the DOL refused to allow Terrill to participate in Diversity Day because his ancestors hailed from the Confederacy, Terrill is the victim of actionable national origin discrimination.

The conclusion that the scope of the prohibition against national origin discrimination encompasses Terrill's claims is supported by cases interpreting the scope of analogous protections granted by other laws. For example, in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the

Court held that Congress intended 42 U.S.C. § 1981 to protect people from discrimination based on their "ancestry or ethnic characteristics," and that a claim under this statute does not require proof that the discrimination was because of some "distinctive physiognomy" of the victim. *Saint Francis College*, 481 U.S. at 613. In his concurring opinion, Justice Brennan pointed out that:

> Pernicious distinctions among individuals based solely on their ancestors are antithetical to the doctrine of the equality upon which this Nation was founded ... I write separately only to point out that the line between discrimination based on 'ancestry or ethnic characteristics' and discrimination based on 'place or nation of ... origin,' is not a bright one ...

Id. at 614 (internal citations omitted). Although there is no direct connection between Terrill's 42 U.S.C. § 2000e-16(a) claims and the 42 U.S.C. § 1981 claims asserted in *Saint Francis College*, both statutes are basically intended to prohibit improper discriminatory practices, and so the holding in *Saint Francis College* suggests that the Fourth Circuit's view of the scope of national origin claims is too narrow.

"National Origin" is Not Synonymous with "Separate Nation"

The fact that Confederate Americans like Terrill, who trace their family's ancestry back to the Confederate States of America, have no sovereign homeland to return to does not affect the analysis of Terrill's claims under these facts. This is because the broad definition of and construction of "national origin" does not require there to be a sovereign "nation" that one can return to. Instead, national origin

status turns on a number of considerations, including the place where a person's ancestors resided, any physical characteristics associated with a given group, any cultural characteristics associated with a given group, and linguistic characteristics associated with a given group, etc. 29 C.F.R. § 1606.1. These disparate elements means that proof that a person has a particular national origin does not require the claimant to produce a map and point to a particular country from which his ancestors came; in fact, it is not necessary that any such nation-state ever have existed to state an actionable national origin claim.

The clearest example of this is found in *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667 (9th Cir. 1988), a case foreshadowing the ethnic hatred that embroiled the Balkans in the 1990's. In *Pejic*, the plaintiff, who was of Serbian descent, claimed that he was being discriminated against by his supervisor, whose niece had married a man of Croatian descent. *Pejic*, 840 F.2d at 670. The defendant argued that the plaintiff failed to state a viable claim for national origin discrimination, because Serbia was not (at that time) a country, but rather was a state in the federal nation of Yugoslavia. In rejecting this argument, the Court of Appeals noted:

> Despite [the defendant's] assertions, the legislative history and the Supreme Court both recognize that 'national origin' includes the country of one's ancestors. Unless historical reality is ignored, the term 'national origin' may include countries no longer in existence ... Given world history, Title VII cannot be read to limit 'countries' to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination. Animus based on national origin can persist long after new political structures and boundaries are

> established. Therefore, Serbians are a protected class, and Pejic meets the first requirement for a *prima facie* case.

Id. at 673.

A similar conclusion was reached in *Dawavendewa v. Salt River Project Agricultural Improvement & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998), where the Court of Appeals held that an American Indian could bring a national origin discrimination claim, despite the fact that the Indian tribe to which he belonged had never been a sovereign nation recognized by other nations. *Dawavendewa*, 154 F.3d at 1119-20 (noting that Title VII provides protection for discrimination based on place of origin, not nation of origin).

These cases show that national origin protections are available to parties such as Terrill, who claim membership in some group that does not now hove a sovereign national home. The fact that the Confederacy is not currently an extant sovereign government does not mean that Confederate American is not a national origin subject to protection. To the extent that the Fourth Circuit's decision was based on the conclusion that Confederate American cannot be a national origin because the Confederacy is not and never was sovereign, it conflicts with decisions of other Courts of Appeal and should be reversed.

"National Origin" Includes "Sub-National" Groups

Relatedly, cases addressing the question of national origin discrimination also prohibit discrimination against individuals who are members of what might be characterized as "sub-national" groups; that is, a group that has a distinct and separate identity, but which is found wholly within the boundaries of another, larger, sovereign

nation-state. Because a person's national origin does not require that they originate from some sovereign nation to be entitled to protection, it stands to reason that members of distinct and identifiable groups within a nation may be entitled to protection from discrimination on national origin grounds.

National origin protection has been extended to several "sub-national" groups, the first of which are the Acadians of Louisiana. In *Roach v. Dresser Industrial Valve & Instrument Div.*, 494 F. Supp. 215 (W.D. La. 1980), the court found that a Louisiana Acadian (in the vernacular, a "Cajun") stated an actionable national origin claim against his employer, rejecting the assertion that the fact that Acadia was never an independent nation and that Acadians now lived mostly in the United States meant that an Acadian could not state a national origin claim:

> Defendant's first contention in this regard is that since Acadia is not and has never been an independent nation, it could not be the plaintiff's 'national origin.' Distinctions between citizens solely because of their ancestors are odious to a free people whose institutions are founded upon the doctrine of equality, and we decline to accept the argument that litigation of this sort should be governed by the principles of sovereignty.
>
> We conclude that the plaintiff is protected by Title VII's ban on national origin discrimination. The Louisiana Acadian is alive and well. He is 'up front' and 'main stream.' He is not asking for any special treatment. By affording coverage under the 'national origin' clause of Title VII he is afforded no special privilege. He is given only the same protection as those with

> English, Spanish, French, Iranian, Czechoslovakian, Portuguese, Polish, Mexican, Italian, Irish, et al., ancestors."

Roach, 494 F. Supp. at 218.

Other courts have extended similar protection to other sub-national groups, including Creoles, *Metoyer v. State of Kansas*, 874 F. Supp. 1198 (D. Kan. 1995), and the Roma (commonly known as "Gypsies"). *Janko v. Illinois State Toll Highway Auth.*, 704 F. Supp. 1531 (N.D. Ill. 1989). In the related context of a 42 U.S.C. § 1981 suit, the Second Circuit held that Puerto Ricans are entitled to protection against discrimination, despite the fact that Puerto Rico is a Commonwealth administered by the United States, because Puerto Ricans as a group are an "identifiable class." *Lopez v. Thomas, Inc.*, 831 F.2d 1184, 1188 (2nd Cir. 1987).

Like Cajuns and Puerto Ricans, Confederate Americans are an identifiable class. The distinct nature of Southern culture has been discussed at length in a number of academic and popular treatises, including in a lengthy entry in the *Harvard Encyclopedia of American Ethnic Groups* (Stephen Thernstron, ed. 1980) likening Southerners to immigrant ethnic communities more commonly found in northern states. By holding that Confederate American is not a protected class because it is not a "valid" national origin and dismissing Terrill's claims, the Fourth Circuit has made a determination regarding the status of a distinct and identifiable group, a decision which denies the members of that group the protection of federal civil rights laws. Given the important nature of this determination, the issue should instead be decided by the Court.

II. IN CONCLUDING THAT TERRILL DID NOT SUFFER AN ADVERSE EMPLOYMENT ACTION, THE FOURTH CIRCUIT DECIDED AN ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE COURT.

In addition to holding that Confederate American is not a "valid" national origin, the Court of Appeals also held that Terrill failed to prove that the DOL's refusal to allow him to participate in Diversity Day festivities constituted an adverse employment action, because Terrill did not show that the DOL's refusal denied him the benefit of a term, condition, or privilege of his employment based on Terrill's claimed national origin. However, in this case, such a showing was not required; all Terrill had to do was show that he was denied some privilege of his employment with DOL, a showing made when he showed that he was not permitted to participate in the DOL-sponsored Diversity Day.

Participation in Diversity Day is a Privilege of Terrill's Employment

As the Court has held, the question of what constitutes a term, condition, or privilege of employment deserving of protection is determined expansively. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). Privileges of employment encompass more than just the contractual employment terms such as salary, *Faraghar v. City of Boca Raton*, 524 U.S. 775, 786 (1998), and include any benefit an employee has a right to receive that is attributable to his employment, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). This means that an employer who elects to provide some benefit to its employees, even if it is a benefit the employer is under no obligation to provide, may not discriminate against the employees receiving the benefit on the basis of their national origin. *Hishon*, 467 U.S. at 75.

Diversity Day was an event sponsored and run by DOL, Terrill's employer. Diversity Day was organized for and open to DOL employees, and was conducted on DOL property. At Diversity Day, DOL employees were invited to participate in a morale-building workplace event, an event intended to increase DOL's employee awareness of other cultures and of the diversity of the DOL workforce. Diversity Day was presumably intended to be fun – an enjoyable diversion from the humdrum of work – and included a raffle, vendors, entertainment, games, food, etc. Under the circumstances, the right to attend and/or participate in Diversity Day festivities was clearly a benefit of employment extended to Terrill and other DOL employees.

Even though the DOL was not required to host Diversity Day, its decision to do so means that it then had the obligation to treat all DOL employees who wished to participate in Diversity Day equally, and not discriminate among them. DOL does not have the right to pick and choose which employees are allowed to participate in Diversity Day and which employees are not allowed to participate, if those decisions are made for impermissible reasons, such as national origin. Because Diversity Day is a benefit associated with Terrill's employment at DOL, an event which was sponsored by his employer and which was only open to him because he was an employee of DOL, participation in Diversity Day is a term, condition, or privilege of his employment, one which is deserving of legal protection if Terrill is denied this benefit.

A Tangible Employment Action Against Terrill is Not Required to Allow Him to Bring Suit

Before the Court of Appeals, Chao argued that DOL's discrimination against Terrill was permissible because refusing to allow Terrill to participate in Diversity Day is not a tangible employment action about which Terrill

has the right to complain. *Burlington Indus., Inc v. Ellerth,* 524 U.S. 742, 761 (1998) (defining a "tangible employment action" as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"). However, the argument that Terrill must suffer a tangible employment action before he can complain about national origin discrimination is incorrect because it proves too much. If correct, courts would be unable to find that discriminatory treatment of an employee that has been prohibited by federal law affects the terms, conditions or benefits of employment, unless the denial affected some "core" benefit of employment (such as a certain rate of pay or a promotion), a requirement for some act of discrimination to constitute an adverse employment action. To hold otherwise would mean allow employers to enact such patently discriminatory rules as "No Jews at the company picnic," or "No Hispanics are allowed in the cafeteria," and then avoid liability for its discrimination by arguing that these rules do not constitute an adverse employment action because they do not affect their employee's salary, opportunities for promotion, or job duties. This clearly improper result may be avoided by recognizing that because Terrill does not seek to recover damages from his employer for discriminatory acts, but rather only injunctive relief, the tangible employment action requirement does not affect Terrill's rights to bring his claim.

Tangible Employment Actions in Harassment Claims

The Court's most recent discussion of tangible employment actions is found in two companion sexual harassment cases, *Faraghar* and *Burlington Industries.* The issue presented in both these cases was when employers could be held liable for sexual harassment occurring in the workplace. in these two cases, the Court grappled with how

to ensure that an employer would not be "automatically" vicariously liable for unsanctioned acts of sexual harassment committed by low- to mid-level employee under *respondeat superior* or similar theories, while still being held liable for acts of harassment of which it was aware and regarding which it did nothing, or for allowing the harasser to use his position in furtherance of the harassment. The solution arrived at was the requirement that there be some kind of tangible employment action to support the victim's claim that the employer should be vicariously liable.

The basis of these holdings is the conclusion that if an employee who sexually harasses another employee is in a position to take a tangible employment action against the victim (such as denying the victim a promotion or cutting the victim's salary), this proves that the harasser possesses a sufficient degree of authority from the employer to justify holding the employer liable for the harasser's wrongful acts. Because a tangible employment action may, by definition, only be taken by someone given authority to act on behalf of the employer, and the tangible employment action could not have been taken but-for this delegation of authority, courts will find employers vicariously liable for harassment if a tangible employment action has occurred the harassment essentially becomes "an official act of the enterprise, a company act." *Burlington Indus.*, 524 U.S. at 760-762.

In contrast, sexual harassment claims based on the existence of a hostile work environment does not require proof of tangible employment action, because the harm caused by the hostile work environment does not depend on the harasser enjoying the employer's sanction or authority to act. Instead, a hostile work environment is created by the victim's co-workers, individuals who may not have any right to take an tangible employment action against the victim. Because the existence of a hostile work environment does not depend on the ability to take some tangible employment action, none is required. As Justice Kennedy noted in the *Burlington Industries*:

> As a general proposition, only a supervisor ... can cause [the sort of injury caused by a tangible employment action]. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor.

Id. at 762.

Accordingly, *Faragher* and *Burlington Industries* stand for the proposition that the existence of a tangible employment action allows an employer to be held liable for the acts of its employees, because the employee has used the authority given him by the company to harm the victim in a direct and tangible way in connection with his improper act of discrimination. Alternatively, an employer may also be liable for discrimination where it is so pervasive that fairness does not require the existence of a tangible employment action to give rise to liability, such as where the victim has been subject to a hostile work environment. The tangible employment action requirement is a safeguard intended to ensure that employers are not held liable for a wrongful act they did not sanction and of which they knew nothing, unless the facts show that their authority was used to further the discrimination in question.

In contrast, Terrill's claims a different focus. Terrill does not claim that some manager at DOL took some act unrelated to his or her employment with the DOL that discriminated against him, such as subjecting him to sexual harassment. Instead, he claims that certain DOL employees made the direct decision to deny him a benefit of his

employment with the DOL, a decision made as part of their job and pursuant to the authority given to them by DOL. Terrill does not seek to have DOL held financially liable for the acts it did not sanction and which were not related to the job of the discriminating party, but rather seeks to have the DOL be made liable for its own objectively discriminatory practices, practices that deny Terrill a benefit to which he is entitled because of his employment. Such claims do not require Terrill to show he was subject to an tangible employment action before he can bring a claim for the denial of some right, benefit or privilege associated with his employment. Otherwise, an employer could nakedly and openly discriminate against employees on the grounds of their religion, race, national origin, etc., so long as the employer did not allow this discrimination to affect the employees' pay or promotions.

Chao's argument confuses the requirement that the prohibited discrimination affect some benefit of employment, which Terrill concedes is a prerequisite to liability, with the requirement that there must have been a tangible employment action before an employer will be found to be vicariously liable for the claimed discriminatory act. Instead, these are separate elements of Title VII claims, and are treated separately by the courts. *See, e.g., Munday v. Waste Management of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998) (finding that orders to "ignore and spy on an employee" is not an adverse employment action "without evidence that the terms, conditions, or benefits of [the employee's] employment were adversely affected").

CONCLUSION

For all of the foregoing reasons, the Petitioner requests this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DON CURTIS TERRILL,	)
	)
Plaintiff-Appellant	)
No. 01-1877	)
	)
v.	)
	)
	)
ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	)
	)
Defendant-Appellee	)

Appeal from the United States District Court
For the Eastern District of Virginia, at Alexandria
Claude M. Hilton, Chief District Judge.
(CA-00-1488-A)

Submitted: February 25, 2002
Decided: March 11, 2002

Before WILLIAMS and KING, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Kirk D. Lyons, SOUTHERN LEGAL RESOURCE CENTER, INC., Black Mountain, North Carolina, for Appellant. Paul J. McNulty, United States Attorney, Steven E. Gordon, Assistant United States Attorney, Alexandria, Virginia for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Don Curtis Terrill appeals the district court's order granting summary judgment and construes the facts in the light most favorable to the nonmoving party. *Scheduled Airlines Traffic Offices, Inc. v. Objective, Inc.*, 180 F. 3d 583, 590-91 (4th Cir. 1999). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Once the moving party discharges its burden by showing there is an absence of evidence to support the nonmoving party's case, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587(1986). Summary judgment will be granted unless a reasonable jury could return a verdict for the nonmoving party on the evidence presented. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Terrill asserts that participation in his employers "Diversity Day" as a cultural exhibitor was a benefit of his employment that he was denied due to his national origin as

a "Confederate-American." We agree with the district court that Terrill failed to establish a prima facie case of discrimination based on national origin.

In order to establish a prima facie case of employment discrimination, Terrill must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) at the time of the adverse action he was performing to his employer's expectations; and (4) other similarly situated employees who are not members of the protected class did not suffer the same adverse action. *Brinkley v. Harbour Recreation Club*, 180 F. 3d 598, 607 (4th Cir. 1999). Terrill fails to establish that he is either a member of a protected class or that he suffered an adverse employment action.

Accordingly, we affirm the district court's order based on its reasoning as stated from the bench at its summary judgment hearing. We dispense with oral argument, because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

DON CURTIS TERRILL,	)
Plaintiff,	)
	)
Civil Action No. 00-1488-A	)
	)
v.	)
	)
ELAINE CHAO, Secretary,	)
U.S. DEPARTMENT OF LABOR,	)
Defendant.	)

Filed: May 1, 2001

ORDER

This matter comes before this Court on Defendant's Motion to Dismiss or in the Alternative for Summary Judgment.

For the reasons stated from the bench it is hereby, ORDERED that Defendant's Motion to Dismiss or in the Alternative for Summary Judgment is hereby GRANTED.

/s/
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
May 1, 2001

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION OFFICE OF FEDERAL OPERATIONS
PO BOX 19848
WASHINGTON, DC 20036

DON CURTIS TERRILL, Complainant,	)
Appeal No. 01992831	)
v.	)
Agency No. 9-11-035	)
Alexis M. Herman, Secretary, U.S. DEPARTMENT OF LABOR, Agency.	)

Filed May 31, 2000

DECISION

Complainant filed the instant appeal from the agency's decision dismissing complainant's complaint for failure to state a claim.[1] In the complaint, complainant claimed that he was discriminated against on the basis of his national origin when in August 1998 complainant was denied participation as a cultural display exhibitor in the

[1] On November 9, 1999, revised regulations governing the EEOC's federal sector complaint process went into effect. These regulations apply to all federal sector EEO complaints pending at any stage in the administrative process. Consequently, the Commission will apply the revised regulations found at 64 Fed. Reg. 37,644 (1999), where applicable, in deciding the present appeal. The regulations, as amended, may also be found at the Commission's website at www.eeoc.gov.

agency "Diversity Day " activities. Complainant listed his national origin as "Confederate-American." The agency essentially found that "Confederate-American" is not a national origin and therefore dismissed the complaint for failing to state a claim.

The Commission's regulations state that discrimination on the basis of "national origin" is prohibited by Title VII. 29 C.F.R. § 1614.103(a). The Commission's regulatory definition of national origin discrimination is as follows:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

29 C.F.R. § 1606.1.

On appeal, complainant states that his ancestors were citizens of the Confederate States of America (CSA). Complainant explains that the CSA was a sovereign nation that passed and enforced laws, raised armies, borrowed money on the credit of Confederate States, printed money, and undertook "all of the other normal activities and powers which define a sovereign nation state." Complainant argues: "The fact that the CSA - defeated in was and occupied by victorious United States armies - ceased to exist as a nation in mid-1865 does not mean that discrimination against persons of CSA ancestry no longer exists some 134 years later."

The Commission finds that complainant's claim that he was discriminated against on the basis of his national origin of Confederate-American is a claim that complainant

was discriminated against because of his ancestor's place of origin - Confederate States of America. The Commission finds that the instant complaint was properly dismissed for failing to state a claim pursuant to the regulation set forth at 64 Fed. Reg. 371,644, 37,656 (1999) (to be codified as 29 C.F.R. § 1614.107(a)(1)).

The agency's decision dismissing the complaint is AFFIRMED.

[Procedural instructions omitted]

FOR THE COMMISSION:

Carlton M. Hadden, Acting Director
Office of Federal Operations

May 31, 2000

Directorate of Civil Rights
Filed August 18, 1998

1. Employee/Applicant Name	2. Job Title and Grace
DON C. TERRILL Computer Specialist	GS-0334-13
3. Address	4. Telephone No.
a. Home	b. Office
a. Home: 703-914-8016	b. Office: 703-235-1484
3836 Fairfax Parkway Alexandria, VA 22312	Mine Safety & Health Admin. Office of Assessments 4015 Wilson Boulevard Arlington, VA 22203

5. Bases: National Origin, Confederate-American

6. Explanation and Dates:

On or about 3 August 1998, Katherine Hoover, acting for the Secretary of Labor, refused me participation as an cultural display exhibitor celebrating my national origin in the Department's 11 September 1998 "DOL Day - Celebrating Diversity" based upon my national origin.

7. Corrective Action(s) desired:

a. That the Secretary of Labor sign and post a notice to all employees informing them that the Department will not discriminate against me based on my national origin. Such notice is to be on 8 ½ X 14-inch white paper in 14-point or

larger type and posted for 30 days Department-wide on all bulletin boards and other places (including Lan/Internet broadcast) where notices for employees are normally posted.

b. That, if this complaint can be resolved before 11 September 1998, the Secretary must approve my request to participate as an exhibitor (as stated) in the "DOL.Day-Celebrating Diversity," that this participation shall be without discrimination against me based on my national origin, and the Secretary shall provide me with sufficient time to prepare an exhibit by taking one of these two actions: (a) granting me 10 calendar days to prepare my exhibit, of which three of those days shall be paid administrative absence, and rescheduling (if necessary) the "DOL Day" to a later date in 1998 to provide for this schedule; or (b) granting me 21 calendar days to prepare my exhibit and rescheduling (if necessary) the "DOL Day" to a later date in 1998 to provide for this schedule.

c. That, if this complaint cannot be resolved prior to 11 September 1998, the Secretary shall be directed to conduct a :"DOL Day-Celebrating Diversity" in September 1999 at the same location and with the same theme, timely notice, and invitation as the September 1998 "DOL Day," and that I shall be entitled to prepare and display a cultural exhibit at that event honoring my national origin without being discriminated against because of my national origin.

d. That the person(s) responsible for making the decision which is here at issue, or carrying it out, be disciplined.

8. EEO Counselor Name and Telephone Number: Florene Byrd, 703-235-1550

9. Date EEO Counselor contacted: 14 August 1998

10. I do not care to remain anonymous.

11. I have NOT filed a grievance/complaint on the same issue with another office or union.

12. I request union representation as provided by law or contract.

I3. I request that all correspondence be sent directly to me.

14. Signed: August 18, 1998

15. Signature of Don C. Terrill

ADDENDUM

Ms. Lillian Winstead, EEO Coordinator
Frances Perkins Building, Room N4123
U. S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

August 21, 1998

Dear Ms. Winstead:

I refer to me EEO complaint dated 18 August 1998.

On 21 August I learned the name of one other person involved in the decision to discriminate against me based on my national origin, and I learned that other unnamed person were also involved in the conspiracy. Therefore, I am submitting herewith an amended complaint in which some of the detail of Item 7 has been modified. The revised Block 7 now reads:

> On or about 3 August 1998 Stepp Tali, Katherine Hoover, and others not identified, acting for the Secretary of Labor, refused me participation as a cultural display exhibitor celebrating my national origin in the Department's 11 September 1998 "DOL Day-Celebrating Diversity" based upon my national origin.

Sincerely,

DON C. TERRILL
3836 Fairfax Parkway
Alexandria, VA 22312